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MICHAEL ROBAX, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-592

**LARIMER COUNTY DEPARTMENT
OF SOCIAL SERVICES, THE BOARD
OF COUNTY COMMISSIONERS OF
LARIMER COUNTY, THE COLORADO
STATE DEPARTMENT OF SOCIAL
SERVICES, ARMANDO RATENCIO,
MARTIN C. COKER, DOUGLAS
KEASLING, LARRY R. LONG,
BENJAMIN F. NAPHEYS III, DAVID
WEITZEL, NONA THAYER, and
WILLIAM LOPEZ,**

Petitioners,

vs.

**THE HONORABLE JOHN L. KANE, JR.,
United States District Judge for the
District of Colorado, and DAVID
BRYAN PIRENTE,**

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FEIGER & LAWSON

Lynn D. Feiger
1624 Market Street
Market Center, Suite 205
Denver, Colorado 80202
Telephone: (303) 571-4715

Attorneys for Respondents

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The above-named Respondents, by and through their attorneys, Feiger and Lawson, pray that the Petition for Writ of Certiorari filed by the above-named Petitioners requesting review of the Judgement of the United States Court of Appeals for the Tenth Circuit entered on September 18, 1979, be denied.

OPINIONS BELOW

As a point of clarification, the Respondents would note that the District Court ruling in this matter issued from the bench only after full and exhaustive legal argument on the issues.

QUESTIONS PRESENTED

The information sought by Respondent Pirente pursuant to Rules 30, 33 and 34 of the Federal Rules of Civil Procedure which became the subject of the District Court ruling of August 24, 1979, is incorrectly described by the Petitioners in the Petition. Respondent Pirente requested that the District Court order discovery of information concerning only those employees who had been terminated by the Petitioners and employees who had received unsatisfactory performance ratings.

The District Court ordered the Petitioners to comply with the discovery request subject to a protective order which precludes Respondent Pirente and his attorneys from using the information for any purpose not directly related to this lawsuit.

The Respondents disagree with the questions presented in the Petition and suggest the following as the issues appropriately before the court:

1. Did the District Court usurp its power by ordering the discovery of documents, allegedly privileged, relating to employee personnel files and thereby make relief by way of Writ of Mandamus and Prohibition appropriate in this case?
2. Is a government employee who files a lawsuit alleging that he has been deprived of his civil rights through the actions of his employer in terminating him entitled to discovery of personnel information concerning other employees who have been terminated or have received "unsatisfactory" performance evaluations?
3. If the District Court permits such discovery conditioned on compliance with a Protective Order which limits the use of the information so obtained to purposes directly related to the lawsuit, is it appropriate for the U.S. Supreme Court to examine the sufficiency of the Protective Order?

STATEMENT OF CASE

The Respondents agree with the Statement of Case in the Petition except for the description of the discovery sought and the contention that irreparable harm will result from the disclosure of the information sought.

The discovery which was the subject of the District Court's order concerned only the personnel documents of those employees who have been terminated by the Petitioners-Defendants or who have received unsatisfactory performance ratings. The characterization of this information as privileged and confidential is questionable, and, in any event, the District Court's Protective Order would safeguard the interests of the employees by strictly limiting the use of the information.

ARGUMENT

The Petitioners contend that review of the decision below is justified because the decision 1) erroneously permits the District Court to usurp its power, and 2) conflicts with the decision of the United States Supreme Court in Detroit Edison Co. v. N.L.R.B., ____ U.S. ____, 99 S.Ct. 1123 (1979) and poses questions of first impression which should be addressed in review.

These reasons are insufficient to justify review by this court and are based on a misleading interpretation of the District Court's Order as well as of the relevant case law.

I. The District Court did not usurp its power by compelling discovery.

The Petitioners have repeatedly characterized the scope of the discovery ordered in this case as "without any limitation". In fact, the District Court ruling concerned only information from the personnel files of employees who have been terminated and who have received unsatisfactory evaluations; as such, the ruling would affect fewer than ten people, according to information provided by the Petitioners.

Further, the court conditioned disclosure of the information upon the drafting of the parties and approval by the Court of a Protective Order which would strictly limit the use of the information discovered. Although counsel for the Respondent Pirente sought to negotiate an acceptable proposed Protective Order with counsel for the Petitioners, counsel for Petitioners responded only by declining to sign the proposed order, which was then forwarded to the District Court for approval. The Protective Order as issued by the District Court provided that the documents could be seen only by Respondent Pirente's attorneys and their representatives and used only for purposes directly related to this lawsuit.

Prior to the District Court's ruling, the Petitioners refused to provide the discovery on the grounds of privilege and irrelevance. No authority has ever been cited to support the claim of privilege, but if the right to privacy as recognized in Detroit Edison Co. v. N.L.R.B., *supra*, and Griswold v. Connecticut, 381 U.S. 479 (1965) is seen as applicable in this case, it must also be recognized that that right is not absolute and must be balanced with Respondent Pirente's need for the information sought.

Although the Petitioners have offered to provide the information on an identity-deleted basis, Respondent Pirente could not agree to this because the documents would then be useless for purposes of comparison, since it would be impossible to correlate information from varying sources relating to specific employees. The Petitioners have also offered to release the information for any employee who agrees to such release; however, at least one employee expressed concern that she would be viewed as supporting Plaintiff-Respondent Pirente in his lawsuit if she agreed to the release.

The vague allegations made by the Petitioners that disclosure of the information sought will cause irreparable damage to the evaluation system of the Department of Social Services and to the privacy interests of other employees have never been supported by any specific evidence. The Petitioners did not offer, during argument on Plaintiff-Respondent Pirente's Motion for Determination With Respect to Discovery, any evidence that the employees involved actually fear invasion of privacy.

The need for the information sought and its relevancy to the issues presented in Respondent Pirente's lawsuit is very clear, however. In order to show that he has been subjected to disparate treatment, Respondent Pirente must compare his treatment with that of other employees. The burden of proof is heavy in civil rights cases, and, therefore, full discovery is absolutely essential. Gaison v. Scott, 59 F.R.D. 347, 352 (D.C. D. Hawaii 1973); Lora v. Board of Education of the City of New York et al, 74 F.R.D. 565, 579 (D.C. E.D.N.Y. 1977).

In this case, the Protective Order issued by the District Court sufficiently safeguards the confidentiality and privacy rights of both the Department of Social Services and the employees, thereby correctly balancing these interests with the right of Respondent Pirente to full discovery. The District Court, being familiar with the parties and circumstances involved, was in the best position to determine the sufficiency of the Protective Order which, by its own direction conditioned the release of the information.

The Tenth Circuit Court of Appeals, by denying the Petition for Writ of Mandamus, recognized that the District Court had neither usurped its power by compelling discovery nor abused its discretion by approving the Protective Order as written.

II. The decision below is not in conflict with the other decisions of the United States Supreme Court, nor does it pose questions of first impression subject to review by the Court.

The facts of this case are easily distinguished from those in Detroit Edison Co. v. N.L.R.B., *supra* and, therefore, the decision below does not conflict with that decision. In Detroit Edison the Court reviewed an N.L.R.B. order that a union be allowed discovery of psychological tests used by the Detroit Edison Company and scores achieved by employees. Although the N.L.R.B. ordered the union not to take any action which might cause the tests to fall into the hands of employees who had taken or were likely to take them, the Court was not satisfied with this safeguard and vacated the N.L.R.B. decision. One of the primary concerns of the Court seemed to be that the union would not be subject to a contempt citation if it ignored the restrictions, because the union was not a party to the enforcement proceeding in the appellate court.

Obviously, the security and privacy interests involved in Detroit Edison were quite different from those of the instant case, as was the risk of violation of the restrictions. Unlike the union, Respondent Pirente and his attorneys would be subject to a contempt citation if the provisions of the District Court's Protective Order were violated.

Although the Petitioners state that the instant case also poses questions of first impression which would justify review of the decision below, they fail to articulate these questions thereby making it impossible for the Respondents to challenge them, or the court to consider them. The courts have considered the discovery involved in this case on many occasions since the passage of the Civil Rights Act of 1964 especially, and have resolved the conflict with protective orders. Carr v. Monroe Manufacturing Company, 431 F.2d 384 (5th Cir. 1970); Gaison v. Scott, 59 F.R.D. 347, 352 (D.C. D. Hawaii 1973); Lora v. Board of Education of the City of New York, et al., 74 F.R.D. 565, 579 (D.C. E.D. N.Y. 1977). The District Court in this case similarly balanced the interests and attempted to resolve the conflict.

III. The Tenth Circuit Court of Appeals acted within its discretion in denying the Petition for Writ of Mandamus and Prohibition.

The United States Supreme Court has indicated that the remedy of mandamus is a "drastic one, to be invoked only in extraordinary situations". Kerr v. United States District Court, 426 U.S. 394, 402 (1976); Will v. United States, 389 U.S. 90, 95 (1967); Bankers Life and Casualty Company v. Holland, 346 U.S. 379, 382-385 (1953); Ex parte Fahey 332 U.S. 258, 259 (1947). The "extraordinary situation" which would justify this remedy is a judicial usurpation of power. Will v. United States, supra, at 95.

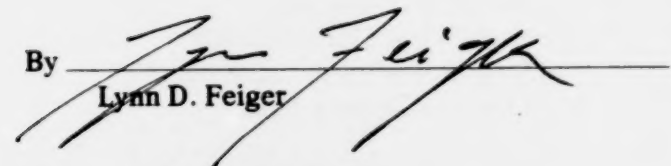
It is also pointed out in Kerr v. United States District Court, supra at 403, that issuance of the Writ is largely a matter of discretion with the court to which the petition is addressed. Schlagenhauf v. Holder, 379 U.S. 104, 112n. 8 (1964).

Given the circumstances of this case, the Tenth Circuit Court of Appeals apparently decided that the District Court's Action did not constitute a usurpation of power and, therefore, denied the petition. The Respondents respectfully contend that the Court of Appeals acted within its discretion in denying the Writ of Mandamus and that the Petition for Writ of Certiorari should be likewise denied.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

FEIGER & LAWSON

By 
Lynn D. Feiger

Attorneys for the Petitioners
1624 Market Street
Market Center, Suite 205
Denver, Colorado 80202
Telephone: (303) 571-4715

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been mailed this 29th day of November, 1979 to:

Richard D. Greengard, Esq.
Robert E. Crane, Esq.
ELLIOTT & GREENGARD
50 S. Steele Street, Suite 700
Denver, Colorado 80209

Honorable John L. Kane, Jr.
United States District Court
District of Colorado
C-145 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294

Solicitor General
Department of Justice
Washington, D.C. 20530

Cynthia A. Charles